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No. 66;

IN THE

Supreme Court of the United States

October Term, 1960.

ANTHONY BRUNO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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Anthony Bruno, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on November 15, 1960.

CITATIONS TO OPINIONS BELOW.

The opinion of the trial judge (R. 648) is unreported and is printed in Appendix A hereto, *infra*, p. 9. The opinion of the Superior Court of Pennsylvania (R. 856), printed in Appendix B hereto *infra*, p. 36, is reported

in 192 Pa. Superior Ct. 513, 162 A. 2d 421 (1960). The opinion of the Supreme Court of Pennsylvania (R. 912, 913), printed in Appendix C hereto, *infra*, p. 48, is reported in 401 Pa. 549 (1960).

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on November 15, 1960 (R. 912); p. 51 *infra*. Reargument was denied December 2, 1960 (R. 899). The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

QUESTION PRESENTED.

1. Whether action by a state court compelling a defendant in a state criminal case to be tried together with other defendants who are indicted for separate and distinct offenses, occurring at a different time and place from the offenses for which he is indicted, and where there is no general charge of conspiracy linking all the defendants being tried together, violates the due process clause of the Fourteenth Amendment of the Federal Constitution.

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved is Section 1 of the Fourteenth Amendment containing the due process clause which provides:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT.

Petitioner Bruno was indicted by the grand jury in Allegheny County on Bill of Indictment June Sessions 1959, No. 128, containing five counts charging conspiracy and various illegal lottery offenses (R. 15). This bill of indictment charged that Bruno committed these offenses together with Joseph Carmen Grosso, Sam Grosso, Jack Sandman and Gen Attenasio on April 20, 1959.

On June 23, 1959, the District Attorney of Allegheny County filed a motion with the Court of Quarter Sessions of Allegheny County requesting that this bill of indictment, No. 128, June Sessions 1959, he consolidated for trial with Bill of Indictment No. 417, March Sessions 1959. This latter bill of indictment, No. 417 March Sessions 1959, charged Sam Grosso, Lillian Alberts, Gen Attenasio, Charles Cheetham, Jennie Gatta, Gerald Grosso, Joseph Carmen Grosso, Edmund Lovejoy, Ruth Lovejoy, Ronald Lovejoy, Joseph Pino, Mary Robinson and Jack Sandman with conspiracy and various lottery offenses alleged to have been committed on February 19, 1959, two months prior to the time that the charges contained in Bill of Indictment No. 128 were alleged to have been committed. No indictment was ever returned by the grand jury of Allegheny County linking Bruno with the offenses charged on Bill of Indictment No. 417 March Sessions 1959, or charging Bruno with participating in a general conspiracy together with all of the defendants named on Bill of Indictment No. 417.

The question of the legality of this consolidation of trials was first raised by counsel for Bruno by objecting to the motion to consolidate the trials. Despite this objection by counsel, the Court of Quarter Sessions of Allegheny County ordered that the two separate indictments be consolidated for trial and noted the exception taken by counsel for Bruno (R. 25).

Subsequently the District Attorney of Allegheny County moved that the defendants Edmund Lovejoy, Ruth Lovejoy and Ronald Lovejoy be severed from the consolidated trials on the ground that they were to be Commonwealth's witnesses. At the time of this motion for severance by the Commonwealth, counsel for Bruno again objected to Bruno's being compelled to stand trial with all of the defendants on Bill of Indictment No. 417, in which he was not included, and with whom he was not linked by any general charge of conspiracy. This objection was made in the following manner by counsel for Bruno (R. 28):

> "MR. LIVINGSTON: I represent Anthony Bruno who's being tried with what is known as the infamous 'Jefferson Borough Case.' Mr. Bruno's case was consolidated over my objections. At this time I will make a motion in conjunction with this case. I would like Mr. Bruno's case severed also. The facts are changed and the reason for the consolidation was because of preparation of the Jefferson Borough case. They were all going to be tried together. Mr. Bruno wasn't in Jefferson Borough and I am sure that the District Attorney will admit he was picked up at Oakland in an automobile with four defendants who were in Jefferson Borough. I think it is prejudicial to try Mr. Bruno in the Jefferson Borough case."

The court overruled counsel's objection and refused to sever Bruno from the consolidated trial (R. 35).

On the second day of trial, September 25, 1959, the District Attorney of Allegheny County had set up in front of the jury a series of card tables on which were placed adding machines and other evidence and paraphernalia seized in the raid that occurred on February 19 which was the subject matter of Bill of Indictment No. 417. The display prepared by the district attorney was an effort to recreate the scene observed by the raiding police officers in the basement of the home in Jefferson Borough (R. 85).

Bruno was not charged with having had anything to do with the Jefferson Borough numbers headquarters and was charged with committing offenses occurring two months after the offenses contained in Bill of Indictment No. 417, March Sessions 1959.

Counsel for Bruno first moved for the right to take photographs of the display of evidence before the jury for the purpose of demonstrating the prejudice to Bruno. His motion was overruled (R. 82, 83). Then counsel for Bruno moved for the withdrawal of a juror because of the presence of the display of evidence, unrelated to Bruno, before the jury. This motion also was overruled (R. 86).

Bruno was found guilty by the jury on the first and second counts of Bill of Indictment No. 128, and was sentenced on the first count charging conspiracy as follows: to pay a fine of $500.00 and to undergo imprisonment of not less than ten months and not more than twenty-four months (R. 6).

Counsel for Bruno again raised the question of the illegality of the consolidated trials in his motion for a new trial (R. 5-11). The Court of Quarter Sessions of Allegheny County refused counsel's motion for new trial and entered the judgment of sentence as indicated (R. 678).

Bruno took an appeal from this judgment of sentence to the Superior Court of Pennsylvania. Counsel for Bruno raised in this appeal the question of the illegality of the consolidated trials (R. 685, 691-706). The Superior Court affirmed Bruno's conviction and judgment of sentence and held that although Bruno had not been indicted in Bill of Indictment No. 417, his being compelled to stand trial with all of the defendants charged in Bill of Indictment No. 417 was proper, *since on the basis of the evidence produced at the trial* "he could have been indicted on Bill of Indictment No. 417" (R. 860, 864, 866). Judge Gunther dissented as to Anthony Bruno, without opinion (R. 866). Again, counsel for appellant raised the question of the illegality of the consolidated trials on a petition for reargument to the Superior Court (R. 867). This petition for reargument was refused by the Superior Court on July 27, 1960 (R. 853).

Counsel for Bruno then filed a petition for allowance of an appeal to the Supreme Court of Pennsylvania in which he again raised the question of the illegality of the consolidated trials. This appeal was allowed on August 22, 1960 (R. 898). The question of the illegal consolidation of trials was raised in the brief before the Supreme Court of Pennsylvania and in the oral argument (R. 745). The Supreme Court of Pennsylvania affirmed the judgments of sentence on the opinion of Judge Ervin for the Superior Court. A dissenting opinion was filed by Mr. Justice Cohen in which Mr. Justice Musmanno and Mr. Justice Bok joined (R. 912, 913). A petition for reargument was filed which again raised the question of the illegality of the consolidation of trials and emphasized that this constituted a federal question under the decisions in federal courts (R. 900-905). On December 2, 1960, the petition for reargument was refused with Justices Musmanno, Cohen and Bok dissenting (R. 899).

REASONS FOR GRANTING THE WRIT.

The decision of the court below permitting the consolidation of trials in this case clearly violates the due process clause of the Fourteenth Amendment of the Constitution of the United States. As the opening sentence of the dissenting opinion in the Supreme Court of Pennsylvania states, the judgment "flagrantly violates every concept of justice and fair play which . . . is part of our administration of criminal law" (R. 913).

In essence, the decision of the majority of the Supreme Court of Pennsylvania approves procedures in Pennsylvania which permit the trial of defendant "A" together with defendant "B" on charges for which "A" has not been indicted with "B" and which on the face of "B's" indictment are not related as to the facts, time and place to the charges for which "A" has been indicted. In justifying its approval

of the consolidation of the trial of petitioner Bruno with the other defendants, the opinion of the Superior Court, adopted by the Supreme Court of Pennsylvania, stated that the defendants were linked together in a general conspiracy. However, there was no general conspiracy indictment in this case. The opinion of the Superior Court declared that even though there was no such indictment, nonetheless, sufficient evidence was adduced at the trial of appellant to support an indictment if it had been made. To try a defendant on a charge for which he was not indicted is the grossest violation of the due process guarantees of the Fourteenth Amendment. In *Cole v. Arkansas*, 333 U. S. 196, 201 (1948), the Supreme Court of the United States stated:

> "No principle of procedural due process is more clearly established than that notice of the specific charges, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re: Oliver, 333 U. S. 257, and the cases there cited."

The *Cole* case is strikingly parallel to the instant case. There defendants were indicted, tried and convicted for the violation of Section 2 of an Arkansas statute concerning unlawful assembly. On Appeal, the defendants challenged the constitutionality of this section. The Supreme Court of Arkansas avoided the constitutional issue by holding that the evidence at the trial of the defendants would have also established a conviction of Section 1 of the same Act and therefore affirmed convictions on that basis. The Supreme Court of the United States struck down the decision as a clear violation of the Fourteenth Amendment.

That consolidated trials of this kind deny a defendant any chance of a fair trial is clearly demonstrated by the facts of the instant case. Here the jury was forced to listen to the evidence of two separate crimes and to review the exhibits and seized paraphernalia relating to one set of de-

fendants which had no relationship to the petitioner Bruno. It is highly unlikely that the jury was able to properly classify the separate distinct charges against the various defendants. In all probability, whatever reasonable doubt may have been in the jury's mind had Bruno been tried separately, was improperly overridden by the identification of Bruno with an offense, also being tried before them, for which Bruno had not been indicted.

The principle approved of by the Supreme Court of Pennsylvania in this case encourages prosecutors to conduct mass trials linking different defendants charged with separate and distinct offenses, joining strong cases with unrelated weak cases, and thereby obtain sweeping convictions of all parties tried without each defendant being given the opportunity of having his case separately and carefully considered by a jury. This question merits review by this Court for the purpose of preserving the right of defendants to due process of law in criminal cases in accordance with the Fourteenth Amendment to the Federal Constitution.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

SAMUEL DASH,
Counsel for Petitioner.

APPENDIX A.

OPINION.

LEWIS, J.

This matter comes before the court en banc on Motions for a New Trial and Motions in Arrest of Judgment filed on behalf of each of the defendants.

The testimony revealed that in October, 1958, Edmund Lovejoy, who lived on the Old Clairton Road in Jefferson Borough, was approached in a downtown tavern by Joseph Pino, one of the defendants, who asked Mr. Lovejoy if he had a garage for rent. Mr. Lovejoy agreed to rent the garage in the basement of his house on the Old Clairton Road to Joseph Pino for $25.00 per month. In addition to the use of the garage, Mr. Pino was also given permission to use the basement area.

Shortly after Mr. Lovejoy rented the garage, Mrs. Ruth Lovejoy received a telephone call to have the garage doors open at 9:00 o'clock in the morning and at 2:30 o'clock in the afternoon. Between October, 1958, and February 19, 1959, she received calls on fifteen different occasions requesting her to have the garage doors open. These calls were received the night before the doors were to be opened. After the doors were opened in the morning, a station wagon would drive into the garage. Mrs. Lovejoy, on a number of occasions, saw the defendant, Neil Harrington, get out of the station wagon, and carry cases or boxes into the basement. The station wagon, which was owned by Neil Harrington, would leave the premises in the morning and return at 2:30 o'clock in the afternoon.

After the station wagon entered the garage in the afternoon, Mrs. Lovejoy heard sounds coming from the basement which she thought were made by adding machines, until 7:30 o'clock in the evening. After 7:30 o'clock in the

evening, the defendant, Joseph Pino would come up from the basement and hand Mrs. Lovejoy a paper bag containing money, which she was instructed to turn over to her husband.

While these strange incidents were taking place at the Lovejoy home, members of the City of Pittsburgh Racket Squad began to follow certain automobiles they thought were being used to carry on the numbers racket. Between February 5, 1958, and February 19, 1958, at approximately 2:30 o'clock P. M., the members of the Racket Squad observed all of the defendants, except Neil Harrington, at the Bill Green Parking lot on Pennsylvania Highway Route No. 51 at various times, getting into the station wagon and driving toward the Lovejoy home on the Old Clairton Road. On a number of occasions, they saw Joseph Grosso, Gerald Grosso, Charles Cheetham and Gen Attanasio park their cars at the Bill Green Parking lot, and go over to the station wagon, carrying brown paper bags. They would then enter the station wagon and drive to the Lovejoy residence.

After keeping the Lovejoy house under surveillance from February 5th to February 19th, the Racket Squad decided to make a raid. They obtained a search warrant and entered the Lovejoy house at approximately 2:30 o'clock P. M. on February 19th. *They found a complete numbers headquarters* in full operation in the basement of the Lovejoy house. Joseph Pino was hiding in a bedroom on the first floor. Lillian Alberts, Gen Attanasio, Charles Cheetham, Jenny Gatto, Joseph Grosso, Jack Sandman and Mary Robinson were all in the basement sitting at tables in front of adding machines. During the raid, Sam Grosso and Gerald Grosso ran from the house, but they were apprehended by police officers stationed on the outside of the house. In addition to the adding machines, tables, rubber bands, paper clips and coin wrappers, the officers found thousands of numbers slips in the basement. There were 17 bags of numbers slips dated February 9th, which contained 3,549 individual slips, with a total play of $14,922.86. There was

785 slips for February 10, 1959, with a play of $2249.08; there was 88 packs for February 11, 1959, containing 13,159 slips, with a total play of $39,241.74; there was 81 packs for February 12, containing 12,054 slips, with a total play of $27,500.02. There was 80 packs for February 13, containing 14,205 slips, with a total play of $44,608.61; there was 80 packs for February 14, containing 11,185 slips, for a total play of $34,371.91; there was 95 packs for February 16, containing 14,928 slips with a total play of $68,752.77; there was 108 packs for February 17, containing 13,266 slips, with a total play of $39,963.16 for February 18, there was 109 packs containing 13,833 slips with a total play of $40,353.20.

On the day of the raid, the 19th, there was a total play of $86,608.87, and the total play from the 9th of February to the 19th was $398,572.71.

In addition to the numbers slips, the officers found two books in the basement, which Officer Leo Flynn, who had made a study of the numbers racket in Allegheny County, testified were kept by the contact men to keep the records of the amount played with each numbers writer. There was either a code number or a name on the top of each page of these books signifying the code number of the numbers writer, or his first name.

The following named defendants were arrested, indicted and convicted for operating a lottery and conspiracy to operate a lottery on February 19th:

> Sam Grosso, Lillian Alberts alias Lillian Miller, Gen Attanasio, Charles Cheetham, Gerald Grosso, Joseph Carmen Grosso, Joseph Pino alias Joseph Pollack, Mary Robinson alias Mary Giamp, Jack Sandman and Cornelius Harrington alias Neil Harrington alias Neil Hamilton.

Edmund Lovejoy and his wife, Ruth Lovejoy, who lived in the house where the headquarters was located on the Old Clairton Road were indicted together with their son, Ronald, but were not tried with the other defendants.

Jenny Gatto was also indicted in connection with the illegal operation on February 19th, but she feigned illness during the trial, and the prosecution against her was continued. After the trial, she was fined $500.00 for being in contempt of court.

On April 20, 1959, and while Sam Grosso, Joseph Grosso, Gen Attanasio and Jack Sandman were still under indictment for conspiracy to operate a lottery on February 19th, they were again arrested with Anthony Bruno for operating a lottery and conspiracy to operate a lottery, and were indicted and convicted on that charge.

Officer Leo Flynn related the following facts in connection with the April 20th arrest:

At 1:15 o'clock P. M. on April 20th he was driving south on the Liberty Bridge when he saw Joseph Grosso driving north. Officer Flynn then made a U-turn on the bridge with the permission of a traffic officer stationed at that point and began to follow Joseph Grosso. Joseph Grosso drove to the Oakland district of Pittsburgh and pulled into a gas station. He then drove out of the gas station and parked in front of the Strand Theatre. He left his car, and Officer Flynn noticed he was carrying a brown paper bag. He approached a car parked nearby at the corner of Forbes and Atwood Streets, and handed the bag in through an open rear window. Officer Flynn then said that Joseph Grosso then walked over to his Cadillac automobile and drove to the Medical Arts Parking Garage, where he left his car. After leaving the Medical Arts Parking Garage, he walked over and entered the DeSoto sedan, which was the same car in which he deposited the brown paper bag a few minutes before. Officer Flynn, who had been joined by Officer Walsh of the Pittsburgh Police Department, followed the car to Bellefield Avenue, where the car was stopped. After the car was stopped, the police officers observed that Anthony Bruno was driving the car, Sam Grosso was seated in the front seat next to the driver, Joseph Grosso, Gen Attanasio and Jack Sandman were all sitting

in the back seat. The car was searched and there was a brown paper bag found under a newspaper in the back seat containing two books similar to those seized in the numbers headquarters on February 19th.

The names of the numbers writers either appeared in code or were listed by their first names and were the same code numbers and names which appeared in the books seized on February 19, 1959.

On June 23, 1959, an application was made to the court to consolidate the indictments involving the February 19th arrest and the April 20th arrest. This application was opposed by defendants' counsel, but an order was made by Judge Sara Soffel permitting the consolidation. An exception was granted to the defendants. The defendants came to trial on September 24, 1959, and all were convicted of conspiracy to operate a lottery and for operating a lottery.

The defendant, Anthony Bruno, through his counsel, and the defendant, Sam Grosso, through his counsel, contends that Judge Sara Soffel erred in consolidating the indictments, but counsel for Anthony Bruno was the only one who argued that point before the court en banc, and the only attorney for any of the defendants who covered the matter in his brief.

The appellate courts of Pennsylvania have ruled that the consolidation of bills of indictment for trial is largely within the discretion of the trial judge. Judge Sara Soffel was not the trial judge. The matter of the consolidation, however, was fully argued before her by counsel representing the Commonwealth and counsel representing the defendants, and it was her considered opinion that the bills of indictment should be consolidated, and with this decision, we agree.

The rule seems to be that where the indictments are closely related and the crimes charged grew out of the same acts and much of the same evidence is necessary or applicable to all the defendants involved, it is permissible and advisable to consolidate them for trial.

Commonwealth vs. Lehman, Appellant, 166 Pa. Superior Ct. 181, 70 A. 2nd 404;
Commonwealth vs. Kaysier, Appellant, 166 Pa. Superior Ct. 369, 373, 71 A. 2nd 846;
Commonwealth vs. Krzesniak, Appellant, 180 Pa. Superior Ct. 560.

The evidence seems clear in the instant case that the crime charged on April 20th, 1959, was not only related to the crime charged on February 19th, 1959, but it was a continuation of the conspiracy to violate the lottery laws, which began back in October of 1958.

When the Lovejoy residence was raided on February 19th, 1959, Sam Grosso, Joseph Grosso, Jack Sandman and Gen Attanasio, were all found to be actively engaged in operating a numbers headquarters.

The testimony revealed that the method of operation of the numbers ring was for the various contact men, who carried brown paper bags, to rendezvous at the Bill Green Parking area between 2:00 o'clock P. M. and 2:30 o'clock P. M. in the afternoon, get into a station wagon and drive to the numbers headquarters at the Lovejoy residence on the Old Clairton Road. The station wagon was camouflaged with a sign bearing the words, "General Contracting."

On February 17th, 1959, Officer John Nee, who was parked in the Bill Green Parking Lot, saw the station wagon hereinbefore referred to, which was being driven by Anthony Bruno, pull into the parking lot and park, about 2:30 o'clock in the afternoon. He saw Gen Attanasio, one of the defendants, enter the station wagon, and then he saw Gerald Grosso get out of his car, which was parked in the parking area, carrying two brown paper bags and one white paper bag. He walked over to the station wagon and deposited the three paper bags inside. He then went back to his automobile, picked up a notebook and two other books, and came back to the station wagon. The books, as described by Officer Nee, were "the large school type". He

entered the station wagon and the station wagon then left the parking area. Officer Nee followed it to the Lovejoy home, where it entered the garage in the basement.

The operation on April 20th was similar in nature only at a different location within the City of Pittsburgh. At approximately 1:15 o'clock P. M., on that date, Officer Flynn followed a car operated by the defendant, Joseph Carmen Grosso. He followed the car to the Oakland district of the City of Pittsburgh. Joseph Grosso got out of his car near the Strand Theatre and walked over to a DeSoto sedan, which was parked near Forbes and Atwood Streets. He was carrying a brown paper bag similar to the one which Gerald Grosso was carrying on February 19th when he got out of his car at the Bill Green Parking area. Joseph Grosso, after handing the brown paper bag to someone inside the DeSoto sedan, then parked his Cadillac at the Medical Arts Building Garage, returned to the DeSoto sedan, and entered the rear door. The DeSoto sedan drove off and was followed by Officers Flynn and Walsh to Bellefield Avenue, where it was stopped. Anthony Bruno was in the driver's seat and Sam Grosso was in the front seat beside him. The other occupants of the car were Joseph Grosso, Gen Attanasio and Jack Sandman. The brown paper bag which Joseph Grosso was carrying a short time before when he entered the DeSoto sedan, was under a newspaper on the back seat. It contained adding machine tapes and two black notebooks similar to the ones Officer Nee saw Gerald Grosso carrying when he entered the station wagon on February 17th and similar to the ones found in the numbers headquarters on February 19th.

Officer Flynn testified that the books and tapes concealed in the back seat of the DeSoto sedan on April 20th were identical with the books confiscated in the raid on February 19th, 1959. The names and the code numbers of the various numbers writers were identical with the names and the code numbers contained in the books confiscated on February 19th, 1959. Furthermore, some of the adding ma-

chine tapes confiscated on April 20th, 1959, had code numbers inscribed on them and others had the first names of the numbers writers inscribed on them which corresponded to the code numbers and the names contained in the books seized on April 20th, and also corresponded to the code numbers and names in the books seized on February 19th, 1959.

There seems to be no doubt that the nefarious operation carried on by the defendants on April 20th was a continuation of the illegal operation of February 19th, 1959, which had only been interrupted because of the raid on the Jefferson Borough headquarters.

The evidence introduced by the Commonwealth proved that all of the defendants, including Anthony Bruno, had conspired to operate and participate in the operation of a lottery in the Lovejoy residence in Jefferson Borough. They had an established pattern and modus operandi. They met together at the same time and place and proceeded in a specially camouflaged station wagon to the numbers headquarters.

The defendant Bruno was identified as participating in the Jefferson Borough operation and on one occasion was seen driving the station wagon and picking up two of the co-defendants, one of whom was carrying a brown paper bag and two notebooks, and driving them to the Lovejoy residence.

When the defendant Bruno was arrested on April 20th, he was again driving a car that picked up Joseph Grosso, who was carrying a brown paper bag when he entered the car. When the car was stopped, record books and number tapes were found in the car similar to the ones picked up in the numbers headquarters in the Old Clairton Road on February 19th. Four of the men arrested in the raid on February 19th were in the car.

In the case of the *Commonwealth vs. Russo et al., Appellants*, 177 Pa. Superior Ct. 470, four defendants were tried together and convicted on the charge of perjury and obstructing justice. They were all police officers and were

accused of softening their testimony before a Grand Jury, after having arrested certain individuals on the charge of sodomy. A number of indictments against each of the defendants were consolidated for trial, each one pertaining to a separate and distinct arrest and prosecution of a separate individual.

The Superior Court said the trial court did not err in permitting the consolidation because the evidence supported the charge in each case and would be admissible in all the other cases to prove that the acts were intentional and willful and not accidental and also to prove motive and to show a plan, design or scheme, and a common purpose, and to rebut any inference of mistake.

If we project this rule over into the facts in the instant case, it becomes clear that it was not only proper to consolidate these indictments but it was also advisable to consolidate them.

In order to show that the defendants, Sam Grosso, Joseph Grosso, Gen Attanasio, Jack Sandman and Anthony Bruno were intentionally and willfully engaged in the operation of the numbers racket on April 20th, and to rebut any inference of a mistake of their intention on that date, the Commonwealth had the right to show that they were connected with the illegal operation on February 19th, and how that operation tied in with their activities on April 20th. The Commonwealth was able to do this by showing that the books and tapes seized on April 20th tied in with the books and tapes seized on February 19th. They were able to do this by showing that the method of operation was exactly the same in relation to picking up the contact man but only at a different place.

The testimony in connection with the arrest on February 19th was also admissible in connection with the arrest on April 20th to show the general over-all plan or scheme the defendants used to violate the lottery laws.

It is, therefore, the opinion of the court that it was not error to consolidate the indictments.

Counsel for the defendant, Anthony Bruno, complains because testimony was admitted into evidence over his objection to the effect that on February 17th the defendant Bruno was seen picking up Gen Attanasio and Gerald Grosso in the Bill Green Parking Lot in the camouflaged station wagon and driving them to the numbers headquarters on the Old Clairton Road. Gerald Grosso at that time was carrying two brown paper bags, a white paper bag and two notebooks. The defendant Bruno was not indicted for the February 19th offense but only for the alleged offense of April 20th.

Officer Flynn testified that the books seized in the February 19th raid and in the April 20th raid were kept by contact men in the numbers racket so they would have a record of the business done by each writer.

One of the clearest statements of the rule permitting testimony of participation on other offenses is contained in the old case of *Goerson vs. Commonwealth*, 99 Pa. 388, 398, which is still the law in Pennsylvania.

The court on the *Goerson* case, supra, had this to say:

> "Under some circumstances evidence of another offense by the defendant may be given. Thus it may be given to establish identity; to show the act charged was *intentional and willful, not accidental; to prove motive, to show guilty knowledge and purpose and to rebut any inference of mistake.*"

The *Goerson* case has been followed in Pennsylvania by a long line of appellate court cases all reiterating the same principle of law. *Saven vs. Commonwealth*, 104 Pa. 218; *Commonwealth vs. Coles*, 265 Pa. 362; *Commonwealth vs. Weiss*, 284 Pa. 105; *Commonwealth vs. Bell*, 288 Pa. 29; *Commonwealth vs. Chalfa*, 313 Pa. 175; *Commonwealth vs. Dorsey*, 362 Pa. 259; *Commonwealth vs. Rabinowitz*, 73 Pa. Superior Ct. 221; *Commonwealth vs. Flick*, 97 Pa. Superior Ct. 221; *Commonwealth vs. Krolak et al.*, 164 Pa. Superior Ct. 288; *Commonwealth vs. Thurman et al., Appellant*, 167 Pa. Superior Ct. 642.

While the defendant Anthony Bruno was not indicted for the offense of February 19, 1959, the evidence indicates strongly that he was identified with the numbers racket being carried on in the Lovejoy residence. On February 17th he picked up Gerald Grosso and Gen Attanasio, who got out of his car in the Bill Green Parking Lot carrying two brown paper bags, one white bag and two notebooks, and drove them in the camouflaged station wagon to the Lovejoy residence where they entered the basement garage where the numbers operation was being carried out.

On April 20th, Joseph Grosso, who was also arrested in the numbers headquarters on February 19th, entered the car driven by the defendant Anthony Bruno carrying a brown paper bag, which was later found under a newspaper on the rear seat of the car and which contained adding machine tapes and two coded books identical with the coded tapes and books picked up in the Jefferson Borough raid. Sam Grosso, Gen Attanasio and Jack Sandman, all of whom had been arrested in the February 19th raid, were also passengers in the car.

Certainly the fact that Anthony Bruno was driving the station wagon on February 17th, which was being used in the operation of the numbers headquarters, plus the fact that he picked up Joseph Grosso at or about the same time as he picked up Gerald Grosso on April 20th and drove him to the numbers headquarters on the Old Clairton Road, was strong evidence that his being with Joseph Grosso on April 20th and three other members of the gang arrested in the raid at the numbers headquarters on February 19th was no mistake. This was also strong evidence to prove what his motive was in being with the other defendants on April 20th, as well as strong evidence of guilty knowledge and his purpose in being with them on April 20th, when they were transporting numbers paraphernalia.

It is, therefore, our opinion that Officer Nee's testimony that he saw the defendant, Anthony Bruno, picking up Joseph Grosso and Gen Attanasio on February 17th and

driving them in a camouflaged station wagon to the Lovejoy residence, where the numbers racket headquarters were in operation, was properly admissible.

Counsel for the defendant, Anthony Bruno and the other defendants arrested on April 20th, 1959, contend that the evidence in connection with the April 20th arrest was not sufficient to sustain a conviction. As authority for their position, they cite the case of *Commonwealth vs. Marino, Appellant, et al.*, 142 Pa. Superior Ct. 327.

In the *Marino* case, the defendant was riding in the front seat of an automobile driven by one Frank Mango when it was stopped by the police. Under the front seat were 35 numbers slips. Marion testified he knew nothing about the numbers slips under the front seat and that he was riding downtown as the guest of Mango, who had picked him up a short time before. Mango substantiated Marino's testimony and the Commonwealth was unable to rebut it. The Superior Court held that the evidence against Marino was wholly circumstantial and insufficient to sustain a verdict.

The instant case is clearly distinguishable from the *Marino* case. In the instant case Anthony Bruno was the driver of the car just as he was on February 17th when he picked up Gerald Grosso and Gen Attanasio at the Bill Green Parking Lot and took them to the numbers headquarters in Jefferson Borough.

The modus operandi was exactly the same as it was on February 19th. The evidence indicated that Sam Grosso, Gen Attanasio, Jack Sandman and Joseph Grosso had a rendezvous in the Oakland district just as they formerly had a rendezvous in the Bill Green Parking Lot on February 19th and on a number of occasions prior to the arrest on that day.

This theory is supported by the fact that when arrested on April 20th, they all had parking tickets in their possession, except Anthony Bruno, indicating that they all parked their cars in the Medical Arts Building Garage which was only a short distance from where Joseph Grosso was seen

handing a brown paper bag to someone sitting in the back seat of a DeSoto sedan, which was being driven by Anthony Bruno at the time of the arrest.

Furthermore, the adding machine tapes and the two books found in the brown paper bag on the back seat of the DeSoto sedan on April 20th were identical in all respects except as to the amount of money played with the writers as those seized in the raid on February 19th.

According to Officer Flynn, who had made a study of the numbers racket over a period of years, the books seized in the raid in the Jefferson Borough headquarters contained the records of the contact man who goes out and hires the numbers writer. The books show how much business each numbers writer does each day, during the week, and how much the contact man turns over to the headquarters, and how much the headquarters owes him.

Some of the writers were listed in the books by code numbers and some by name. The same code numbers and names of the writers in the books seized on April 30th and the books seized in the Jefferson Borough headquarters on February 19th were the same. The only difference in the two sets of books was that the books seized on April 20th contained no figures on the second page where the play and hit claims were located. Officer Flynn explained that this was due to the fact that the books were seized on Monday, and the first entry that would be made in the book was missing, because the defendants had not as yet arrived at the numbers headquarters to have the amount of money played and the hits tabulated when they were arrested.

Furthermore, the adding machine tapes seized on April 20th had the name of each writer at the bottom of the tape, which not only corresponded with the names in the books seized on April 20th, but they corresponded with the names and code numbers in the books seized on February 19th, as well as with the names on the bottom of each adding machine tape seized on February 19th. Officer Flynn said the figures on the tapes above the name of the writer

was the amount of money turned in by the writer for each day of the following week.

It would seem that the only fair and reasonable inference that could be drawn from the evidence seized in the April 20th arrest is the fact that the defendants were on their way to the numbers headquarters to tabulate the play and wins for that day and to enter the data in the record books they were carrying when they were arrested. This inference is strongly buttressed by the fact that they had in their possession the adding machine tapes for the prior week, and the fact that their method of operation was the same as it was on February 19th, and for a number of days prior thereto, namely, the rendezvousing at the Bill Green Parking Lot area, entering the station wagon with brown paper bags and notebooks, and driving to the numbers headquarters on the Old Clairton Road in Jefferson Borough at approximately the same time in the afternoon.

To be sure, the evidence in regard to the operation on April 20th was largely circumstantial, yet, it is our opinion that it was of such volume and quantity as would reasonably and naturally justify an inference of guilt and overcome beyond a reasonable doubt the presumption of innocence. *Commonwealth vs. Lewis*, 190 Pa. Superior Ct. 591.

It is not necessary to actually find a defendant writing numbers or find him with numbers slips in his possession in order to successfully prosecute him for the violation of the lottery laws.

In the case of *Commonwealth vs. Prezioso, Appellant*, 157 Pa. Superior Ct. 80, the defendant's home was raided and in addition to a large amount of currency, they found canvas bags and coin wrappers supplied by banks to large depositors, many small envelopes containing paper clips and boxes of rubber bands. On Prezioso's person they found wrapped packages of currency and also adding machine tape marked with a bank teller's number, which, according to the bank teller, had been given to one George Sarkis, an admitted member of the numbers operation, but

who denied that Prezioso had anything to do with it. In a raid on the home of Sarkis, which was two doors away from the defendant's home, the police found books and other material used by numbers writers, indicating that is where the pickup men made their returns.

The Court in the *Prezioso* case said:

> "But all the materials found in defendant's possession except his personal effects were of kinds used in the conduct of a numbers lottery. Paper clips and rubber bands were carried in envelopes by numbers writer. The returns in money are largely in coin requiring wrapping. Canvas money bags were used under the evidence to convey the wrapped coins to the bank. Currency in large amounts was necessary to pay off the 'hits'."

In the case of *Commonwealth vs. Mittleman et al., Appellants*, 154 Pa. Superior Ct. 572, five defendants were indicted and convicted of conspiracy together to set up a lottery, namely, a baseball pool. Mittleman printed the tickets in his printing establishment and the advertisements announcing the baseball pool. Saffian was accused of furnishing metal tape peculiarly appropriate and necessary for the fastening or stapling of the lottery tickets. When Saffian's home was searched, the police found tons of metal tape so cut, stamped and processed as to be peculiarly appropriate and necessary for the fastening or stapling of lottery tickets, and for no other use. There was also evidence that he shipped the tape under an assumed name; and when the consignee, who was under surveillance, refused to accept it, he (Saffian) refused to claim it. There was also evidence that this tape with clearly defined marks was used in the fastening or sealing of the Empire Lottery Tickets. The Superior Court held there was sufficient evidence of Saffian's complicity in the scheme to submit the case to the jury.

It is to be noted that the Act of Assembly relative to

lotteries is very broad and not only makes it a crime to set up a lottery, but it makes it a crime to be in any way *concerned* with the operation of a lottery. Being *concerned* in the managing, or conducting, or carrying on a lottery, has been defined to be "substantially engaged in or taking a part in." *Commonwealth vs. Polito*, 190 Pa. Superior Ct. 329.

The evidence seems clear that on April 20th, the defendants were at least concerned with the operation of a lottery. Furthermore, the testimony of Officer Leo Flynn revealed that the adding machine tapes seized on April 20th covered the operation for the *previous* week. Counsel for Anthony Bruno argues that because the indictment alleged a crime on April 20th, the defendant cannot be convicted for a crime committed on another date, and, therefore, unless the testimony was sufficient to establish the defendant's guilt on April 20th, the Motion in Arrest of Judgment in connection with the alleged violation of the April 20th arrest, should be granted. With that, we cannot agree.

Where there is a variance at the trial between the date alleged in the indictment and that proved, but the date of the offense proved was within the period prescribed by the statute of limitations, the variance was not material and the Commonwealth is not required to amend. The time only becomes important when it enters into the nature of the offense; otherwise, any time may be shown on the trial if it is prior to the finding of the indictment and within the period prescribed by the statute of limitations. *Commonwealth vs. Syren et al., Appellants*, 150 Pa. Superior Ct. 32.

Counsel for Anthony Bruno contends that the court erred in admitting testimony of Officer John Nee as to Anthony Bruno's activities on February 17th because the offer of proof of the District Attorney refers to the conspiracy being carried on on February 19th when Anthony Bruno was not indicted in connection with that conspiracy. The offer and proof in that connection was as follows (T. page 420):

"MR. ROSS: We can shorten it up as to that. We intend to show by this witness, the Commonwealth, that

on Tuesday, February 17th, two days prior to this raid, this officer was on surveillance at the Bill Green's Shopping Center; that he saw various of the defendants get into the station wagon, went to the Lovejoy residence, returned from the Lovejoy residence and picked up Gerald Grosso, and at that time the driver of the station wagon was Mr. Bruno. Then the station wagon was returned to the Lovejoy residence. We intend to follow that up by testimony of another witness that on Tuesday, February 17, the setup was in operation in the basement of the Lovejoy home.

MR. LIVINGSTON: For what purpose is this being offered, Mr. Ross?

MR. ROSS: Offered for the purpose to connect Bruno with the operation of the Jefferson Borough lottery, and relation to the conspiracy."

It seems clear to this court that at the time Mr. Ross said: "Offered for the purpose to connect Bruno with the operation of the Jefferson Borough lottery, and relation to the conspiracy", it was being offered to show Bruno's connection with the February 19th conspiracy *for the purpose of proving* his guilty knowledge and intent, motive and the common purpose of those involved in the April 20th operation, including Anthony Bruno.

After the testimony was all in, if counsel for Anthony Bruno found the testimony of Officer Nee was offered only for the purpose of connecting him with the February 19th conspiracy, he should have moved to strike out the testimony of Officer Nee. *Yeager vs. Weaver*, 64 Pa. 425.

Counsel for Anthony Bruno and counsel for Sam Grosso allege as error that the court refused to order the District Attorney to turn over to the defense attorneys the written statement of Mrs. Lovejoy, a Commonwealth witness.

Counsel for the defense cites the case of *Jenks vs. U. S.*,

353 U. S. 669, as authority for the proposition that they were entitled to this statement for the purpose of cross-examining Mrs. Lovejoy.

It is not necessary to decide whether the *Jenks* case is controlling on the state courts, or whether the principle enunciated in that case is the law of Pennsylvania, because no request was made by any of the defense counsel for the statement referred to. In fact, it was made clear by Mr. Mustin, counsel for Samuel Grosso, that they were not interested in the statement, but only if a statement was made.

Counsel for the defendant Anthony Bruno and for the defendant Sam Gross have taken the record and have drawn inferences therefrom which gives an entirely different picture from the true fact situation.

That part of the record which gives rise to defense counsel's complaint that the court refused to instruct the District Attorney to turn over Mrs. Lovejoy's statement to defense counsel, was as follows:

Mrs. Lovejoy (T. Page 615):

MR. LIVINGSTON:

"Q. Did you sign a statement?
A. Yes, sir.
Q. A typewritten statement?
A. I believe it was.
Q. Were you provided with a copy of that statement?
A. No.
Q. You mean they didn't give you a copy of your own statement?
A. No.

MR. ROSS: I would be glad to offer it and let you look it over on one condition.

MR. LIVINGSTON: Don't make a speech.

MR. SHULGOLD: Don't make a statement.

MR. ROSS: If it is offered as part of the evidence I will be glad to do it. I wouldn't allow it to be cross-examined and put in to the side.

MR. MUSTIN: At this time, on behalf of Sam Grosso, I move for the withdrawal of a juror because of the prejudicial remark of the District Attorney in setting up a condition. There has been no condition made. The only thing is we want to know whether there was a statement.

THE COURT: It is up to the District Attorney. If he wants to show the statement, he can. He doesn't have to if he doesn't want to.

MR. MUSTIN: He doesn't have to make a speech. I ask for the withdrawal of a juror.

THE COURT: Motion overruled.

EXCEPTION NOTED.

MR. SHULGOLD: On behalf of my clients, a motion to withdraw a juror and continue the case is made on account of the statement that I consider prejudicial and ——

THE COURT: What are the statements?

MR. SHULGOLD: Statement of the condition—upon which the District Attorney would offer the statement, from which he is reading.

MR. ROSS: It was objected to ——

MR. SHULGOLD: I tried to prevent you from making the statement that you did. And it was a statement

that might influence the jury against my defendant in the event that we don't agree to the condition that the District Attorney set up. If he wanted to make that condition he should have done it at side bar.

THE COURT: Motion refused. Do you make the same motion?

MR. FRIEDMAN: Same motion.

THE COURT: All right.

EXCEPTION NOTED."

It is clear from the record that counsel for Sam Grosso objected to the District Attorney's remarks and asked for the withdrawal of a juror *because he felt he had no right to make such a statement.*

Mr. Mustin, counsel for Sam Grosso, made his intention clear when he made the motion to withdraw a juror when he said: "The only thing is we want to know whether there was a statement."

In view of the fact that it became clear that defense counsel did not want the statement but only wanted to know if Mrs. Lovejoy made a statement, and in view of the fact that the District Attorney had already voluntarily offered the statement to defense counsel, the court made the remark: "It is up to the District Attorney if he wants to show the statement, he can. He doesn't have to if he doesn't want to." The court, in effect, said: "In view of the fact that you are not interested in seeing the statement but only want to know if one was made, the District Attorney does not have to show it to you unless he wants to."

There was no exception taken to the remark made by the court, which is a further indication that defense counsel at the time of the trial did not regard the court's statement as a refusal to order the District Attorney, upon request, to turn over Mrs. Lovejoy's statement.

The only defendants involved in the numbers operation by Mrs. Lovejoy's testimony were Joseph Pino and Neil Harrington, yet, their counsel, Jacob Shulgold, Esq., and O. Hicks Friedman, Esq., did not assign as error the remark made by the court nor did they argue that question before the court en banc.

Mr. Livingston, whose question, "You mean they didn't give you a copy of your own statement?" precipitated the controversy over the District Attorney's statement, neither made a motion to withdraw a juror or took exceptions to the courts' remarks.

Counsel for the defendants complain because the court permitted the Commonwealth to set up the numbers headquarters in the courtroom just as it was set up in the Lovejoy home on the day of the raid, before the evidence, which consisted of tables, chairs, adding machines, numbers slips, currency wrappers and other paraphernalia used in the numbers headquarters, was identified and offered in evidence.

Immediately after the numbers headquarters was set up in the court room, Officer Lynn took the witness stand and identified all the articles in the courtroom as being in the headquarters on the day of the raid and the District Attorney offered them in evidence.

Certainly, the paraphernalia used to carry on the numbers racket was admissible in evidence, and certainly the jury was entitled to see how it was set up on the day of the raid in the Lovejoy basement. The mere fact that all the evidence was set up in the courtroom before each and every piece was identified could not have legally prejudiced the defendants.

Counsel for Anthony Bruno specifically objected to the headquarters exhibit on the theory that his client was not identified with the February 19th raid.

This objection is not well taken, as was pointed out in the prior discussion of the relevancy of the Jefferson Borough operation to Bruno's arrest on April 20th.

The defense counsel also allege as error the fact that certain photographs taken of the numbers headquarters immediately after the raid were admitted into evidence. They specifically objected to the admission of the photographs in evidence because two automatic pistols were lying on one of the tables when the picture was taken. These pistols were found in a safe on the first floor of the Lovejoy home at the time of the raid. They were taken to the basement and laid on one of the tables before the photographs were taken. As the testimony developed, it appeared that these pistols belonged to Mr. Lovejoy and had nothing to do with the operation of the numbers headquarters.

When the photographs were offered in evidence, the court said they would be admitted with the proper explanation to the jury that the pistols had nothing to do with the operation of the numbers headquarters.

Officer Mayer DeRoy, a witness for the Commonwealth, then testified he found the pistols in a strong box on the first floor which was occupied by Mr. and Mrs. Lovejoy.

This testimony was followed by the testimony of Mr. Lovejoy, another Commonwealth witness, who testified the pistols were his and he had them in the house for protection because of the fact that from time to time he collected money on his newspaper route and occasionally kept the money in the house overnight.

The court in its charge told the jury that the testimony revealed the pistols had nothing to do with the numbers operation in the basement. Certainly, with this explanation in regard to the ownership of the pistols, the photographs of the basement numbers headquarters were admissible in evidence and could not possibly have prejudiced the defendants' case.

Counsel for the defendants also contend that the trial judge erred in refusing to withdraw a juror because of certain newspaper articles appearing in the Pittsburgh newspapers during the trial.

Ever since the end of World War II, the "Grosso" name

has been prominently and periodically identified with the numbers operation in Allegheny County.

It is a foregone conclusion that the trial of a case involving a numbers operation where the take was $398,572.71 in ten days would receive considerable publicity.

At the end of the first day of the trial, the court stated to the jury:

> "Members of the jury. I want to admonish you not to talk to anybody about this case, not even among yourselves. If anybody tries to contact you or calls you in any way, immediately get in touch with me. You can call me at my home if you want to. My number is in the telephone book. I would also suggest that you don't listen to any radio or news accounts that might be in the paper or come over the radio with regard to this case. Keep an open mind until all the evidence is in and the case is finally given to you for your consideration."

The case did receive considerable publicity as one might expect.

Defense counsel specifically objected to the first paragraph of a newspaper article which read:

> "A jury of ten women and two men today listened to a story which involved the intrigue and cunning of big time numbers racketeering in the trial of Sam (the Unlucky) Grosso."

If we were to withdraw a juror in a criminal case merely because defense counsel does not like the descriptive adjectives a newspaper writer uses in describing what he had heard at the important trial, it would be impossible to try a case of importance in any county where the crime was committed.

Counsel for the defense also argues that another article appearing in a newspaper during the trial was prejudicial

to their clients. The story, as it appeared in the "Pittsburg Sun-Telegraph", was as follows:

> "Frank Grosso was indicted today by the Allegheny County Grand Jury for writing numbers. Grosso, 46, 523 North Meadowcroft Avenue, Mount Lebanon, was the brother of Sam, the Unlucky Grosso, and the father of Joe Grosso, two of twelve persons now on trial for operating a numbers lottery. Frank was arrested July 6th at Fifth and Penn Avenue, Point Breeze. Police claim he was carrying cash and numbers slips."

The article does not refer to any previous misconduct of the defendants, Sam Grosso and Joseph Grosso, nor did it comment on testimony of a material witness or mistake any of the evidence in the trial.

The mere fact that Frank Grosso was related to two of the defendants in no way reflected on the guilt or innocence of the defendants, unless we are willing to go so far as to presume that jurors are ready to adopt the theory of guilt by association, which would be diametrically opposed to any concept of justice in a democratic nation.

The appellate courts in this state have held that where the publication does not refer to any previous misconduct and does not discredit any material witness or misquote the evidence, and that it was not such that it could have affected the verdict, it is not grounds for a new trial. *Commonwealth vs. Valverdi*, 32 Pa. Superior Ct. 246; *Commonwealth vs. Grotefend & Hahn, Appellants*, 85 Pa. Superior Ct. 7.

The courts have also stated:

> ". . . Jurors must and doubtless can be depended upon to try cases according to the evidence regardless of the casual statements in the daily press." *Wilson et al. vs. Consolidated Dressed Beef Co., Appellant*, 295 Pa. 168.

It is the opinion of the court that the newspaper accounts did not have a prejudicial effect on the jury and could not

possibly have affected the verdict. There have been very few cases tried in this county where the evidence so overwhelmingly pointed to the guilt of the defendants, and any other verdict but guilty, under the circumstances, would have been a gross miscarriage of justice.

Counsel for Sam Grosso also contends that the court erred in charging the jury on "flight", although his counsel did not argue the matter before the court en banc.

Sam Grosso and Gerald Grosso were seen fleeing from the numbers headquarters on the day of the raid and were apprehended by policemen after they had gone a short distance from the Lovejoy house.

The court, in charging the jury, on "flight" said:

> "Now, there was testimony here that during the raid on the 19th of February, that Sam Grosso and Gerald Grosso fled the scene. Flight after the commission of a crime is evidence of guilt and you have the right to consider that together with all the other evidence in the case in determining whether or not these defendants, Gerald and Sam Grosso, were guilty."

Counsel for the defendant Sam Grosso argues that the charge should have followed the exact wording of the definition given by the court in the case of *Commonwealth vs. Lewis*, supra, as follows:

> "When a crime has been committed and the person accused thereof knows he is accused and then flees or conceals himself such conduct is evidence of consciousness of guilt and in connection with other proof may be the basis from which guilt may be inferred."

Counsel for the defendant stated that the trial judge should have stated that "flight" was consciousness of guilt, as stated in the case of *Commonwealth vs. Louis*, supra, and not evidence of guilt, as stated by the trial judge in the instant case.

We are of the opinion that there is no basic difference between the two definitions of "flight". The courts have from time to time used the definitions interchangeably.

In the case of *Commonwealth vs. Fusci, Appellant*, 153 Pa. Superior Ct. 617, the court stated:

> "Flight and concealment are evidence of guilt and the jurors were so instructed in this case."

In *Brown on Evidence*, page 78, Section (F), we find the following language:

> "Flight or concealment after the commission of a crime is evidence of guilt."
>
> *Commonwealth vs. McMahon*, 145 Pa. 413;
>
> *Commonwealth vs. Fusci, Appellants*, 153 Pa. Superior Ct. 617.

Even if the definition of "flight" were not the correct one, because of the omission of the word "consciousness" before the word "guilt", it could not possibly have affected the verdict wherein Sam Grosso and Gerald Grosso were found guilty of conspiracy on February 19th. They were not only seen running from the numbers headquarters but their overcoats were found in the headquarters after the raid. Furthermore, they had been followed to the headquarters numerous times prior to the raid on February 19th.

At the end of the charge, the trial judge said to counsel for the defendants:

> "Gentlemen, is there anything else?"

The only request made upon the court was a request from the attorney for Sam Grosso that the court charge on "identification", which the court refused to do, because there was not a question of identification involved in the instant case.

No request was made to change or correct the court's charge in regard to "flight".

A litigant may not sit silent and take his chances on a verdict, and if it is adverse, complain of a matter which if error could have been immediately rectified if attention of the trial court had been called to it.

Commonwealth vs. Campbell, Appellant, 116 Pa. Superior Ct. 180;
Mastel vs. Walker, Appellant, 246 Pa. 65.

Where the court at the conclusion of the charge asked counsel if they wished to add or correct the charge, and a negative answer is given, the party cannot complain of inadequacy of the court's instruction. *Davis vs. Nickolson Twp.*, 11 Fay. Legal Journal, 108.

It is the opinion of the court that the defendants had a fair trial and the verdicts were amply supported by the evidence.

Therefore, the Motions in Arrest of Judgment and the Motions for New Trials will be refused.

APPENDIX "B".

IN THE

SUPERIOR COURT OF PENNSYLVANIA.

No. 275 COMMONWEALTH OF PENNSYLVANIA v. SAM GROSSO (Appellant in No. 98), LILLIAN ALBERTS (Appellant in No. 110), CHARLES CHEETHAM (Appellant in No. 101), JOSEPH CARMEN GROSSO (Appellant in No. 100), JOSEPH PINO (Appellant in No. 102).	Nos. 98, 100, 101, 102, 110. April Term, 1960.
COMMONWEALTH OF PENNSYLVANIA v. SAM GROSSO (Appellant in No. 104), JOSEPH CARMEN GROSSO (Appellant in No. 105), ANTHONY BRUNO (Appellant in No. 106).	Nos. 104, 105, 106. April Term, 1960.
COMMONWEALTH OF PENNSYLVANIA v. CORNELIUS HARRINGTON, Appellant.	No. 107 April Term, 1960

APPEALS FROM THE JUDGMENT AND SENTENCE OF THE COURT OF QUARTER SESSIONS OF ALLEGHENY COUNTY AT NOS. 417 MARCH SESSIONS, 1959, 128 AND 129 JUNE SESSIONS, 1959, RESPECTIVELY.

OPINION BY ERVIN, J. Filed: June 15, 1960.

These nine appeals are from judgments of sentence on certain charges of conspiracy and being concerned in the managing, conducting and carrying on of a lottery. In the light of the verdict, the facts are as follows:

In October 1958 Edmund Lovejoy, who lived on the Old Clairton Road in Jefferson Borough, was approached in a downtown tavern by Joseph Pino, one of the defendants, who asked Mr. Lovejoy if he had a garage for rent. Mr. Lovejoy agreed to rent the garage in the basement of his house to Joseph Pino for $25.00 per month. In addition to the use of the garage, Mr. Pino was also given permission to use the basement area. Shortly after the garage was rented Mrs. Ruth Lovejoy received a telephone call to have the garage doors open at 9:00 o'clock in the morning and at 2:30 o'clock in the afternoon. Between October 1958 and February 19, 1959 she received calls on 15 different occasions requesting her to have the garage doors open. These calls were received the night before the doors were to be opened. After the doors were opened in the morning a station wagon would drive into the garage. Mrs. Lovejoy, on a number of occasions, saw one of the defendants, Cornelius Harrington, get out of the station wagon and carry cases or boxes into the basement. The station wagon, which was owned by Cornelius Harrington, would leave the premises in the morning and return at approximately 2:30 o'clock in the afternoon. After the station wagon entered the garage in the afternoon Mrs. Lovejoy heard sounds coming from the basement, which she thought were made by adding machines, until approximately 7:30 o'clock in the evening.

The defendant, Joseph Pino, would come up from the basement and hand Mrs. Lovejoy a paper bag containing money which she was instructed to turn over to her husband. Between February 5, 1959 and February 19, 1959, at approximately 2:30 p. m., the members of the Racket Squad of the City of Pittsburgh observed all of the defendants, except Cornelius Harrington, at the Bill Green Parking lot on Penna. Highway Route No. 51 getting into the station wagon and driving toward the Lovejoy home. On a number of occasions they saw Joseph Carmen Grosso, Gerald Grosso, Charles Cheetham and Gen Attanasio park their cars at the Bill Green Parking lot and go over to the station wagon, carrying brown paper bags. They would then enter the station wagon and drive to the Lovejoy residence.

On February 17, 1959 Officer John Nee, who was parked in the Bill Green Parking lot, saw the station wagon hereinbefore referred to, which was being driven by Anthony Bruno, pull into the parking lot and park about 2:30 o'clock in the afternoon. He saw Gen Attanasio, one of the defendants, enter the station wagon and then he saw Gerald Grosso get out of his car, which was parked in the parking area, carrying two brown paper bags and one white paper bag. He walked over to the station wagon and deposited the three paper bags inside. He then went back to his automobile, picked up a notebook and two other books, and came back to the station wagon. The books, as described by Officer Nee, were "the large school type." He entered the station wagon and the station wagon then left the parking area. Officer Nee followed it to the Lovejoy home, where it entered the garage in the basement.

After keeping the Lovejoy house under surveillance from February 5 to February 19, the Racket Squad obtained a search warrant and entered the Lovejoy house at approximately 2:30 p. m. on February 19. They found a complete numbers headquarters in full operation in the basement of the Lovejoy house. Joseph Pino was hiding in a bedroom on the first floor, Lillian Alberts, Gen Attanasio, Charles

Cheetham, Jennie Gatto, Joseph Carmen Grosso, Jack Sandman and Mary Robinson were all in the basement sitting at tables, in front of adding machines. During the raid Sam Grosso and Gerald Grosso ran from the house but they were apprehended by police officers stationed on the outside of the house. In addition to the adding machines, tables, rubber bands, paper clips and coin wrappers, the officers found thousands of numbers slips in the basement. There were 17 bags of numbers slips dated February 9, which contained 3,549 individual slips, with a total play of $14,922.86. There were 785 slips for February 10, 1959, with a play of $2,249.08; there were 88 packs for February 11, 1959, containing 13,159 slips, with a total play of $39,241.74; there were 81 packs for February 12, containing 12,054 slips, with a total play of $27,500.02. There were 80 packs for February 13, containing 14,205 slips, with a total play of $44,608.71; there were 80 packs for February 14, containing 11,185 slips, for a total play of $34,371.91; there were 95 packs for February 16, containing 14,928 slips with a total play of $68,752.77; there were 108 packs for February 17, containing 13,266 slips, with a total play of $39,963.16; for February 18 there were 109 packs containing 13,833 slips with a total play of $40,353.20. On the day of the raid, February 19, there was a total play of $86,608.87, and the total play from the 9th of February to the 19th was $398,572.71.

In addition to the numbers slips, the officers found two books in the basement which Officer Leo Flynn, who had made a study of the numbers racket in Allegheny County, testified were kept by the contact men to keep the records of the amount played with each numbers writer. There was either a code number or a name on the top of each page of these books signifying the code number or the first name of the numbers writer. The following named defendants were arrested, indicted and convicted for operating a lottery and conspiracy to operate a lottery on February 19: Sam Grosso, Lillian Alberts alias Lillian Miller, Gen Attanasio, Charles Cheetham, Gerald Grosso, Joseph Carmen

Grosso, Joseph Pino alias Joseph Pollock, Mary Robinson alias Mary Giamp, Jack Sandman and Cornelius Harrington alias Neil Harrington alias Neil Hamilton. Edmond Lovejoy and his wife, Ruth Lovejoy, who lived in the house where the headquarters was located, were indicted, together with their son, Ronald, but were not tried with the other defendants. Jennie Gatto was also indicted in connection with the February 19 operation but her case was continued because of illness.

On April 20, 1959, while Sam Grosso, Joseph Carmen Grosso, Gen Attanasio and Jack Sandman were still under indictment for the February 19 operation, they were again arrested, with Anthony Bruno, for conspiracy and being concerned in the operation of a lottery. At 1:15 p. m. on April 20 Officer Leo Flynn was driving south on the Liberty Bridge when he saw Joseph Carmen Grosso driving north. Officer Flynn then made a U-turn on the bridge and began following Joseph Carmen Grosso, who drove to the Oakland district of Pittsburgh and pulled into a gas station. He then drove out of the gas station and parked in front of the Strand Theater. He left his car and Officer Flynn noticed he was carrying a brown paper bag. He approached a car parked nearby at the corner of Forbes and Atwood Streets and handed the bag in through an open rear window. Joseph Carmen Grosso then walked over to his Cadillac automobile and drove to the Medical Arts Parking Garage, where he left his car. After leaving the Medical Arts Parking Garage, he walked over and entered the DeSoto sedan, which was the same car in which he deposited the brown paper bag a few minutes before. Officer Flynn, who had been joined by Officer Walsh of the Pittsburgh Police Department, followed the car to Bellefield Avenue, where the car was stopped. After the car was stopped the police officers observed that Anthony Bruno was driving the car, Sam Grosso was sitting in the front seat next to the driver. Joseph Carmen Grosso, Gen Attanasio and Jack Sandman were all sitting in the back seat. The car was searched

and there was a brown paper bag under a newspaper in the back seat containing two books similar to those seized in the numbers headquarters on February 19. They also found in the brown paper bag adding machine tapes. Officer Flynn testified that these tapes were weekly tapes. Each tape bore a name at the bottom, such as "Edie-X," "Bob," "Gene," "Sam," "Judy," "Buttons," "Mom." The two books which were seized on April 20 contained the names or code numbers for the numbers writers which were shown on the tapes and the names or code numbers on the tapes and the two books seized on April 20 correspond with the names or code numbers in the books that were confiscated on February 19 in Jefferson Borough. In the books seized on April 20 the figures to show how much money was played are missing, indicating to this extent that the books were not complete.

Counsel for Anthony Bruno complains as to the trial of his client at the same time and with the defendants on the charges arising out of the Jefferson Borough raid on February 19, 1959. While it is true that Bruno was not found in the headquarters at the time of the February 19 raid, two days before, on February 17, 1959, he was seen driving the headquarters station wagon to the headquarters, having in the station wagon Gen Attanasio and Gerald Grosso, and also having in it two brown paper bags and one white paper bag. Bruno drove the station wagon from the Bill Green Parking lot, which was the accustomed meeting place for the conspirators, to the headquarters. Bruno was not indicted for the February 19 episode but the evidence was sufficient to have sustained such an indictment. This evidence, in our opinion, was sufficient to connect Bruno with that enterprise. In *Com. v. Russo*, 177 Pa. Superior Ct. 470, 478, 479, 111 A. 2d 359, we said: "It is the settled rule that the consolidation of indictments charging separate and distinct offenses is largely a matter within the sound discretion of the trial judge and where the indictments are closely related his exercise of discretion will not be re-

versed unless it is clearly shown that an appellant has been prejudiced thereby. Commonwealth v. Lehman, 166 Pa. Superior Ct. 181, 70 A. 2d 404; Commonwealth v. Kaysier, 166 Pa. Superior Ct. 369, 71 A. 2d 846; Commonwealth v. Schultz, 168 Pa. Superior Ct. 435, 79 A. 2d 109. And under the modern practice related felonies and misdemeanors may be consolidated for trial before the same jury. Here there was positive testimony before the committing magistrate of the solicitation of sodomy, as against testimony so softened before the grand jury as to fail to make out a prima facie case against any of the sex offenders charged with crime. The consolidation was especially appropriate in these cases for the proofs followed the same pattern and were all interrelated. Evidence establishing the charge of obstructing public justice in each of the cases against a defendant would be admissible in the trial of all of the others to show that the acts were intentional and wilfull, not accidental; to prove motive; to show a plan, design or scheme, and a common purpose and to rebut any inference of mistake. Goersen v. Commonwealth, 99 Pa. 388; Commonwealth v. Chalfa et al., 313 Pa. 175, 169 A. 564."

In Wharton's Criminal Procedure, Vol. 5, §1943, p. 15, it is stated: "The court may order consolidation for trial of indictments in which defendants are charged with crimes of the same class, which are so connected that evidence at the trial of one will be admissible at the trial of others." In *Com. v. Kloiber*, 378 Pa. 412, 415, 106 A. 2d 820, it was said: "Especially is a joint trial permissible, if not advisable, when the crimes charged grew out of the same acts and much of the same evidence is necessary or applicable to both defendants: . . ." In *Com. v. Zwierzelewski*, 177 Pa. Superior Ct. 141, 152, 110 A. 2d 757, we said: "Evidence of acts done in furtherance of the common design was admissible against all participants." See also *Com. v. Morrison*, 180 Pa. Superior Ct. 133, 118 A. 2d 263; *Com. v. Giambrone*, 183 Pa. Superior Ct. 283, 130 A. 2d 254; *Com. v. Nestor*, 183 Pa. Superior Ct. 350, 132 A. 2d 369.

The defendant Bruno, with the other four co-defendants arrested in the Jefferson raid, had met together, apparently by prearrangement, all having in their possession parking stubs for the same garage. This was exactly the modus operandi followed prior to the Jefferson raid, where they customarily met in a central location before proceeding to the headquarters. The evidence in the Jefferson Borough case was admissible in the case arising out of the April 20 arrests for the purpose of showing a plan, design or scheme, and a common purpose. The direct evidence of Bruno's participation in the Jefferson Borough operation was admissible to show his complicity in the plan, scheme, design and common purpose in relation to the April 20 arrests. This evidence was also admissible to show the "motive" of the April 20 meeting and that this meeting was not "accidental," and to rebut any inference of mistake in relation to the meeting. The evidence of the coded books and coded tapes in the Jefferson raid was admissible for the same reasons to show their relationship to the similar books and tapes confiscated on April 20. This was evidence of a plan, design or scheme. It was evidence to show that a continuous numbers operation was in effect. It had not been terminated by the raid conducted on February 19. We are, therefore, of the opinion that Bruno was not prejudiced by the trial of his case with those arising out of the February 19 raid.

It is also argued by counsel for Charles Cheetham, Lillian Alberts, Joseph Pino and Cornelius Harrington, that the trial of the cases which arose from the April 20 incident with those that arose out of the February 19 raid prejudiced these defendants. It must be remembered that Joseph Carmen Grosso, Sam Grosso, Gen Attanasio and Jack Sandman, 4 of the 5 persons involved in the April 20 incident, were also involved in the February 19 raid. These four persons, together with the four defendants, Charles Cheetham, Lillian Alberts, Joseph Pino and Cornelius Harrington, were all indicted on a conspiracy indictment arising out of the

February 19 incident. Especially is a joint trial permissible, if not advisable, when the crimes charged grow out of the same acts and much of the same evidence is applicable to the defendants. Where, as here, the indictments are closely related, such consolidation will not furnish grounds for reversal unless the defendants have been prejudiced thereby. In reality, the original conspiracy to confederate together and operate a numbers game continued from a time prior to the February 19 raid down to and including the April 20 arrests. There were, however, separate substantive offenses on February 19 and April 20. We are of the opinion that none of the defendants were prejudiced by the consolidation of these cases for trial.

It is also argued by counsel for Joseph Carmen Grosso, Anthony Bruno and Sam Grosso that the evidence relating to the April 20 arrests was insufficient to support a conviction. Counsel relies strongly upon the case of *Com. v. Marino*, 142 Pa. Superior Ct. 327, 16 A. 2d 314. In that case we held that the evidence was not sufficient to sustain a conviction of operating a lottery where the only evidence against Marino was that he was a passenger in a car operated by someone else and a bag of numbers was found concealed under the back seat. Marino testified that he had no knowledge of the operation and that he had just accepted the offer of a ride with the driver. None of the defendants in the cases arising out of the April 20 arrests took the stand in their own defense and, therefore, no explanation was given to show why they were present in the car. The mere presence of the defendants in the car was not the only evidence showing their relationship and complicity in the operation of the lottery. Nearly all of the evidence offered in the Jefferson Borough case was admissible in the April 20 case to show the plan, design, scheme and common purpose of the defendants. This evidence also established the motive in the meeting of the defendants on April 20. While it is true that Bruno was not indicted for the February 19 case, he could have been. Furthermore, he was the driver of the vehicle involved in the April 20 arrests.

It has also been argued that the books and tapes found in the car on April 20 concerned the same transaction as those found in the February 19 raid and that therefore Joseph Carmen Grosso and Sam Grosso may not be sentenced a second time for the same offense. Where a person is found guilty of two separate crimes which arise out of the same transaction he can be sentenced only upon the more serious crime: *Com. v. Soudani*, 398 Pa. 546, 159 A. 2d 687. The books and tapes found in the car on April 20 were similar to those taken in the February 19 raid but they were not the same books and same tapes. The specific dates to which the material found April 20 applied did not appear. It seems to us, however, that the April 20 material did not apply to the same time as the February 19 material. Since the April 20 material did not reveal the specific dates to which it was applicable, it could fairly be assumed that it applied to current operations and not to those existing on and before February 19. The same conspiracy undoubtedly continued but the substantive offenses were different and separate. One conspiracy might cover a year with substantive offenses occurring on each separate day thereof. The defendants could not be carrying around the books and tapes applicable to the February 19 raid because all of those books and tapes had been seized by the officers. It is fairly clear from this evidence that the defendants had prepared new books for the same numbers writers and for the purpose of carrying on the numbers operation after the February 19 raid. Joseph Carmen Grosso and Sam Grosso could, therefore, be sentenced for a second substantive offense occurring on April 20. They were not sentenced for any substantive offense occurring on February 19. The sentences growing out of the February 19 raid were upon the conspiracy charge only. Anthony Bruno was sentenced only upon the conspiracy charge growing out of the April 20 arrests. He had not been indicted nor was he sentenced for anything growing out of the February 19 raid. The action of the court below, therefore, did not violate the prin-

ciple of law that a person found guilty of two separate crimes which arise out of the same transaction can be sentenced only upon the more serious crime.

Counsel for Joseph Carmen Grosso and Sam Grosso also argue that it was illegal for the court below to sentence them on the third count of the indictment arising out of the April 20 arrests. This argument is based upon the fact that the jury slips sent out with the jury were returned by the jury, indicating a guilty verdict on the first count of conspiracy and on the second count of lottery. In charging the jury the court said: "Now, the first count in that indictment is conspiracy. If you find the defendants did conspire together to set up this lottery, then they would be guilty of conspiracy, and you would write after that count, 'We find the defendants guilty.' If you find they did not conspire together to set up this lottery you would write after the first count in that indictment, 'We find the defendants not guilty.'

"If you find some of them guilty and some of them not guilty, you would signify which ones were guilty of conspiracy and which ones weren't guilty of conspiracy after that count.

"Then you would pass to the second count of lottery. If you find that the defendants named in that indictment were guilty of setting up, operating a lottery, you would write after the second count concerning that particular indictment, 'We find the defendants guilty,' and, of course, if you find that they did not set up or were concerned with the operation of a lottery on April 20, you would write after the second count, 'We find the defendants not guilty.'

"If you find some of them set up such a lottery, or concerned with the operation of such lottery, you would find them guilty, and if you find the rest of them had nothing to do with setting up a lottery or being concerned with a lottery, you would find them not guilty."

We believe that the jury, under this charge, intended to return a verdict of guilty not only in the conspiracy charge

contained in the first count of the indictment but also on the second and third counts of the indictment charging respectively setting up a lottery and being concerned in the operation of a lottery. Be that as it may, the record shows that the verdict was actually recorded as a general guilty verdict on all counts of indictment No. 128 June Sessions, 1959 applicable to the April 20 arrests. The court, in imposing sentence upon the third count of the indictment; clearly intended to sentence on the charge of being concerned in the operation of a lottery. The verdict having been recorded as a general verdict, the court could have sentenced upon any of the counts of the indictment. A written memorandum of findings of a jury, although filed and preserved, is not part of the record. The only verdict is that which the jury announces orally and which is received and recorded as the jury's findings: *Rottmund v. Penna. R. R. Co.*, 255 Pa. 410, 416, 74 A. 341; *Com. v. Houghton*, 22 Pa. Superior Ct. 52, 54; *Henning v. Keiper*, 37 Pa. Superior Ct. 488, 491. We are, therefore, of the opinion that the court below did not err in sentencing Joseph Carmen Grosso and Sam Grosso on the third count of the indictment.

Judgments of sentence affirmed and it is ordered that appellants appear in the court below at such time as they may there be called and that they be by that court committed until they have complied with the sentences or any part thereof which had not been performed at the time the order of supersedeas was entered.

GUNTHER, J. dissents as to Anthony Bruno.

APPENDIX C.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA AND DISSENTING OPINION.

Commonwealth v. Grosso, Appellant.
Commonwealth v. Bruno, Appellant.

Argued October 6, 1960. Before JONES, C. J., BELL, MUSMANNO, JONES, COHEN, BOK and EAGEN, JJ.

Appeals, Nos. 10, 11, and 12, March T., 1961, from judgments of Superior Court, April T., 1960, Nos. 98, 104, and 106, affirming judgments of Court of Quarter Sessions of Allegheny County, March T., 1959, No. 417, and June T., 1959, Nos. 128, 129, and 429, in case of Commonwealth of Pennsylvania v. Sam Grosso et al. Judgments affirmed: reargument refused December 2, 1960.

Same case in Superior Court: 192 Pa. Super. Ct. 513.

Indictments charging defendants with conspiracy and being concerned in the managing, conducting and carrying on of a lottery. Before LEWIS, J.

Verdicts of guilty and judgments of sentence entered thereon. Defendants appealed to the Superior Court which affirmed judgments, opinion by ERVIN, J.; GUNTHER, J., dissenting as to Anthony Bruno, Appeal to Supreme Court allowed.

Samuel Dash, with him *Thomas A. Livingston*, and *Henry Mustin*, for appellants.

William Claney Smith, Assistant District Attorney, with him *George H. Ross*, Assistant District Attorney, and *Edward C. Boyle*, District Attorney, for appellee.

OPINION PER CURIAM, November 15, 1960:

The judgments of sentence are affirmed on the opinion of Judge ERVIN for the Superior Court, 192 Pa. Superior Ct. 513, 162 A. 2d 421.

DISSENTING OPINION BY MR. JUSTICE COHEN:

I cannot concur in a judgment which so flagrantly violates every concept of justice and fair play which I feel is part

of our administration of criminal law. While I agree with the majority that the conviction of the appellant Grosso be affirmed, I must dissent from the rejection of the contentions of appellant Bruno.

By this judgment of affirmance the majority approves procedures which permit the trial of defendant "A" together with defendant "B" on charges for which "A" has not been indicted with "B", and which on the face of "B's" indictment are not related as to facts, time and place to the charges for which "A" has been indicted. As long ago as *Commonwealth v. Schmidheiser*, 111 Pa. Superior Ct. 283, 169 Atl. 572 (1933), the Superior Court reversed a conviction because "The defendants were charged in separate indictments and they could not, against their protests, have been tried at the same time." This was proper because in *Schmidheiser*, as in the instant case, there was nothing on the face of the indictments which showed any relationship between the two offenses. The Superior Court affirmed its Schmidheiser position in *Commonwealth v. Dauphinee*, 121 Pa. Superior Ct. 565, 183 Atl. 807 (1936), but properly did not apply *Schmidheiser* to the situations in *Commonwealth v. Dixon*, 179 Pa. Superior Ct. 1, 115 A. 2d 811 (1955); *Commonwealth v. Smith*, 186 Pa. Superior Ct. 89, 140 A. 2d 347 (1958), and *Commonwealth v. Evans*, 190 Pa. Superior Ct 179, 154 A. 2d 57 (1959). In *Dixon*, *Smith* and in *Evans*, consolidation of indictments relating to different transactions and different defendants was permitted because there existed in each of these cases one general conspiracy charge linking every one of the defendants tried together. Since a general conspiracy charge was absent in *Schmidheiser*, absent in *Dauphinee* and absent in the instant case, the conviction of *Bruno* should have been reversed. Each case relied upon by the Superior Court to justify its affirmance of *Bruno's* conviction is readily distinguishable from the rule of *Schmidheiser* and *Dauphinee*.

In *Commonwealth v. Russo*, 177 Pa. Superior Ct. 470, 111 A. 2d 359 (1955), the defendants were tried separately. The

Superior Court's discussion in that case concerning consolidation had to do with the consolidation of indictments against the same defendant. Here we have separate indictments charging different defendants with separate offenses. *Commonwealth v. Lehman*, 166 Pa. Superior Ct. 181, 70 A. 2d 404 (1950), also deals with the consolidation of separate indictments against the same defendant. *Commonwealth v. Kaysier*, 166 Pa. Superior Ct. 369, 71 A. 2d 846 (1950), again deals with separate indictments against the same defendant. *Commonwealth v. Schultz*, 168 Pa. Superior Ct. 435, 79 A. 2d 109 (1951), deals with separate indictments against two defendants for the same burglaries. *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A. 2d 820 (1954), deals with separate indictments against three defendants for the same robbery. *Commonwealth v. Zwierzelewski*, 177 Pa. Superior Ct. 141, 110 A. 2d 759 (1955), deals with fifteen separate indictments against fifteen defendants for the same prison riot. *Commonwealth v. Morrison*, 180 Pa. Superior Ct. 133, 118 A. 2d 263 (1955), deals with two separate indictments against two defendants for the same offense of interfering with a witness. *Commonwealth v. Giambrone*, 183 Pa. Superior Ct. 283, 130 A. 2d 254 (1957), deals with the consolidation of trials of three defendants seized in the same gambling raid and indicted for the same offense. *Commonwealth v. Nestor*, 183 Pa. Superior Ct. 350, 132 A. 2d 369 (1957), deals with two separate indictments against the same defendant. In *Commonwealth v. Krzesniak*, 180 Pa. Superior Ct. 560, 119 A. 2d 617 (1956), there were nine bills of indictment, eight charging arson and one charge for setting a junked car afire. The defendant was named on all of these bills of indictment.

Since I cannot reconcile the action taken by the Superior Court and the majority herein with the established safeguards which have surrounded our administration of the criminal law, I dissent.

Mr. Justice MUSMANNO and Mr. Justice BOK join in this dissenting opinion.

APPENDIX D.

JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA.

The judgments of sentence are affirmed on the opinion of Judge Ervin for the Superior Court, 192 Pa. Superior Ct. 513, 162 A. 2d 421.